IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO. 31/2002

The Commissioner of Income Tax
having office at Aayakar Bhavan,
Patto Plaza, Panaji, Goa. ..... Appellant.

V/s.

1. Mohiddin Hotels Pvt. Ltd.
Salgaonkar Building,
Vasco-da-Gama, Goa.

2. The Income Tax Appellate Tribunal
Panaji Bench, Aayakar Bhawan,
Patto Plaza, Panaji, Goa. ..... Respondents

Mr. S. R. Rivonkar, Advocate for the Revenue.

Mr. A. N. S. Nadkarni with Mr. H. D. Naik, Advocates for the Assessee.

CORAM : R.M. LODHA &
N.A. BRITTO, JJ.

DATE : 13TH SEPTEMBER, 2005.

ORAL JUDGMENT (Per R.M. LODHA, J.)

This tax appeal at the instance of the Revenue under Section 260-A of the Income Tax Act. 1961 was admitted for deciding the following substantial question of law:

Whether the income of Rs.7,80,000/- received from V.M. Salgaokar & Bros. Pvt. Ltd. in the hands of Assessee is income from house property under Section 22 or income from business under Section 28 of the Income Tax Act ?

2. Mohiddin Hotels Pvt. Ltd. (the respondent No.1) is a company incorporated under the Companies Act. Hereinafter, we shall refer the said Company as "the Assessee". For the assessment year 1990-91, the Assessee filed return on 30.12.1990 in response to the notice under Section 139(1) and declared a loss of Rs.4,70,464/-. The Assessee constructed a hotel and for commissioning hotel business, by Agreement dated 1/2/1987 appointed V.M. Salgaokar & Brother Pvt. Ltd. (for short 'the Salgaokars') as manager to manage and run the business of hotel. As per the said agreement, an amount of Rs.7,80,000/- was to be paid every year by the Salgaokars for first 10 years as guarantee income to the Assessee. The tenure of the agreement was 20 years and after expiry of 10 years the Salgaokars were required to pay at the rate of Rs.10,20,000/- per annum to the Assessee. Next five years, the Salgaokars were to pay @ Rs.12,00,000/- per annum to the Assessee. The agreement commenced from 1st February, 1987. The Assessing Officer treated the income of Rs.7,80,000/- received

by the Assessee in the previous year from the Salgaokars in the form of guarantee income as income from "house property" vide Assessment Order dated 30.3.1993. The Assessee preferred an appeal before the Commissioner of Income Tax (Appeals). The Appellate Authority reversed the order of the Assessing Officer and treated the guarantee income of Rs.7,80,000/- received by the Assessee from the Salgaokars as "income from other sources" under Section 56 of the Income Tax Act. The Appellate Authority passed the order on 13.12.1993. The Revenue, aggrieved by the decision of the Commissioner of Income-tax (Appeals) preferred an appeal before the Income Tax Appellate Tribunal. The Income Tax Appellate Tribunal overruled the decision of the Commissioner of Income-tax (Appeals) vide its Judgment dated 20.9.2001 and held that the guarantee income in the sum of Rs.7,80,000/- received by the Assessee from the Salgaokars was business income under Section 28 of the Income Tax Act. The Judgment of the Income Tax Appellate Tribunal dated 20.09.2001 is the subject-matter of challenge in this appeal. The substantial question of law that requires consideration and decision by us has been noticed by us above.

3. In ***Universal Plast Ltd. vs. Commissioner of Income-tax,*** (1999) 237 ITR 454, the Supreme Court of India has laid down the general principles relating to income from leasing out the assets of the business by an assessee. The general principles laid down by the Supreme Court in this connection are thus :

> " (1) no precise test can be laid down to ascertain whether income (referred to by whatever nomenclature, lease, amount, rents, licence fee) received by an assessee from leasing or letting out of assets would fall under the head "Profits and gains of business or profession;
>
> (2) it is a mixed question of law and fact and has to be determined from the point of view of a businessman in that business on the facts and in the circumstances of each case, including true interpretation of the agreement under which the assets are let out;
>
> (3) where all the assets of the business are let out, the period for which the assets are let out is a relevant factor to find out whether the intention of the assessee is to go out of business altogether or to come back and restart the same;
>
> (4) if only a few of the business assets are let out temporarily, while the assessee is carrying out his other business activities, then it is a case of

> exploiting the business assets otherwise than employing them for his own use for making profit for that business; but if the business never started or has started but ceased with no intention to be resumed, the assets also will cease to be business assets and the transaction will only be *exploitation of property by an owner* thereof, but not exploitation of business assets."

While laying down the aforesaid general principles and summarizing the legal position, the Supreme Court considered its previous decisions viz., (1) ***CEPT Vs. Shri Lakshimi Silk Mills Ltd.*** [1951] 20 ITR 451; (2) ***Narain Swadeshi Weaving Mills vs. CEPT*** [1954] 26 ITR 765; (3) ***CIT Vs. Calcutta National Bank Ltd.*** [1959] 37 ITR 171; (4) ***Sultan Brothers Private Ltd. vs. CIT*** [1964] 51 ITR 353; (5) ***New Savan Sugar and Gur Refining Co. Ltd. vs. CIT*** [1969) 74 ITR 7; and (6) ***CIT vs. Vikram Cotton Mills Ltd.*** [1988] 169 ITR 597.

4. Keeping in mind the aforesaid legal position, we shall now advert to the facts of the present case and particularly the Agreement dated 1st February, 1987 entered into between the Assessee and the Salgaokars. The agreement recites that the

Assessee has recently completed construction of a building comprised of a ground floor and three upper floors on a plot of land situated at Swatantrapath, in the town of Vasco da Gama with a view to running a hotel therein. The hotel at the time of the execution of the agreement was ready for the purpose of commissioning the hotel business. The Salgaokars possessed the necessary knowhow and trained staff for carrying on the business of running a hotel. There was earlier agreement between the Assessee and the Salgaokars dated 23.2.1984, subsequently modified by Agreement dated 2.1.1985 whereby the Salgaokars were to be appointed as their Managers to manage, run and carry on the business of hotel then under construction on the terms and conditions set out therein. The agreement inter-alia recorded that the Salgaokars were appointed as Managers to manage, run and carry on the business of hotel for a period of 20 years commencing from 1st February, 1987; that the Salgaokars alone shall be entitled to terminate the agreement after expiry of period of 10 years by giving one year's prior notice in writing to the Assessee; that the Salgaokars shall pay a fixed amount @ of Rs.7,80,000/- per annum for the first 10 years, @ Rs.10,20,000/- per annum for the next five years and @ Rs.12,00,000/- per

annum for further next five years; that the Salgaokars shall be incharge of the entire management, running and working of the hotel without any interference from the Assessee; that the Salgaokars shall be entitled to make additions, alternations and/or improvements to the hotel so as to run the same profitably and efficiently; that all licences, permits and no objection certificates relating to the said hotel shall be obtained in the name of the Assessee; that the Assessee shall not alienate or dispose of the hotel or building housing the hotel or any part thereof and/or part with possession thereof during the currency of the agreement; that the Salgaokars shall bring in their own staff for running the hotel and also for keeping and maintaining the said hotel in good condition, subject to the natural wear and tear; that the Assessee shall pay property tax, house tax or any other taxes, levies and public charges; that the Salgaokars shall have right to replace the fittings, fixtures and any installations in the hotel in the event of same becoming unserviceable or unfit for use due to normal wear and tear; that the Assessee does not have any employee, worker and/or staff as of the date and that the Salgaokars shall not be liable to take in service or employment the employees, workers and the staff employed by the Assessee; that the Salgaokars shall not

make any structural alterations or additions without prior permission from the Assessee; that upon expiry of the agreement or sooner determination, the Salgaokars shall surrender vacant possession of the said hotel and hand over the business to the Assessee; that the Salgaokars shall be at liberty to replace any fixtures or fittings and items of machinery and other equipment affixed to and/or existing in the said building after intimation to the Assessee; that the Salgaokars shall not be liable to render accounts to the Assessee and that the agreement was not intended to transfer the said hotel to the Salgaokars, but to improve the management thereof by, so as to run the the said hotel efficiently and profitably.

5. Mr. S. R. Rivonkar, the learned Counsel for the Revenue strenuously urged that the intention of the parties was not to appoint the Salgaokars as Managers to manage, run and carry on the business of hotel. As a matter of fact, the learned Counsel would submit, it could not have been because the hotel was not being run by the Assessee. He would submit that the intention was to lease/license the property and derive income therefrom. The learned Counsel for the revenue submitted that this intention is

reflected from the various clauses in the agreement, particularly that the tenure of the agreement was of 20 years; that the hotel was not being run by the Assessee at the time when the agreement was entered into; that all the licences were to be procured by the Salgaokars; that the Assessee, in fact, had no hotel business; that there was nothing to suggest that the Assessee did anything for carrying on the business of the hotel and that the Assessee had no control over the hotel business.

6. We are afraid the submissions of the learned Counsel for the Revenue cannot be accepted. From the facts found by the Tribunal as well as the Agreement dated 1st February, 1987, it is more than clear that the agreement between the Assessee and the Salgaokars related to the hotel that was ready for the purposes of commencing the hotel business. The agreement does not relate to bare tenement but is in respect of the hotel. That the said hotel was complete with fittings and fixtures and ready for commencing the business is apparent from the agreement. If it was not where was the occasion to mention in the agreement that the Salgaokars shall have right to replace the fittings, fixtures and any installations in the hotel in the event they became unserviceable or

unfit for use due to normal wear and tear. It is true that the name given to the agreement is not decisive; what is important is the intention of the parties. The agreement provides that upon expiration of the term of the agreement or sooner determination thereof, Salgaokars shall surrender the vacant possession of the hotel and handover the business to the Assessee. If the agreement between the assessee and the Salgaokars was a lease or a licence of the building as is sought to be contended by the Revenue, there would not have been covenant providing for that on the expiry of the term of the agreement or sooner determination, the Salgaokars shall hand over the business along with the vacant possession of the hotel. This suggests and rather unambiguously that the Salgaokars were appointed by the Assessee for running the hotel business. The agreement also clarifies and binds the Salgaokars that the agreement is not intended to transfer the hotel to the Salgaokars. It is true that the period for which the business assets are let out is always a relevant factor in finding out whether the intention of the Assessee is to let out the business assets permanently and if the Assessee had never started the business, an inference may be drawn that the Assessee intended to exploit the property and not the business assets but the intention of the

parties has to be gathered from the over-all facts and not the isolated circumstances. It is settled legal position that each case has to be decided on its own facts including the construction of the agreement under which the assets have been let out or handed over to a third party and no precise test can be applied to ascertain as to under which head the income received by the assessee from leasing or letting out the assets should fall. The longer duration of the agreement could have been for many reasons. The one which is discernible from the available material is that Salgaokars helped the Assessee in getting finance for completing the construction of the hotel and for that purpose the parties may have agreed for longer duration. The contention of the Revenue that the Assessee was left with no concern in the business of hotel is negated by the fact that the agreement provides that all the licences, permissions and no objection certificates relating to the hotel which are required for the operation of the hotel business shall be obtained in the name of the Assessee. It is not material that the application for obtaining such licences, permissions or no objection certificates could be made by the Assessee or the Salgaokars. The fact that all licences, permissions and no objection certificates required for running hotel were to be

obtained in the name of the Assessee is pointer to the aspect that the Assessee intended to exploit business assets (the hotel).

7. Section 22 of the Income Tax act deals with income from house property and it reads thus :

> "22. **Income from house property. -** The annual value of the property consisting of any buildings or lands appurtenant thereto of which the assessee is the owner, other than such portions of such property as he may occupy for the purposes of any business or profession carried on by him the profits of which are chargeable to income-tax, shall be chargeable to income-tax under the head "Income from house property".

It needs no emphasis that when a specific head of charge is provided for income from house property, rents or other income from the ownership of the house property it has to be under this head and no other head. However, for an income from house property it should be covered by Section 22. By catena of decisions the Courts, time and again, have held that where the subject-matter that is let out or given on licence is not bare tenement but

is a complex one like a well furnished paying guest establishment or sheds with infrastructural facilities, the income derived therefrom which is not separable as income from letting out the building and the income letting out from the furniture, plant and machinery etc., such composite income shall not be covered by the income from house property. In the present case, the agreement entered into between the Assessee and the Salgaokars on 1.2.1987, reference of which has been made above, clearly shows that a sum of Rs.7,80,000/- received by the Assessee from the Salgaokars in the form of guarantee income was the composite income from the hotel building with fittings and fixtures and was intended for exploitation of business assets and, therefore, cannot be held to be covered by the income from house property.

7. We, accordingly, hold that the income of Rs.7,80,000/- received from V.M. Salgaokar and Bros. Pvt. Ltd., in the hands of the Assessee is income from the business under Section 28 of the Income Tax Act and the Tribunal did not commit any error in holding so.

8. In the result, the substantial question of law is decided in favour of the Assessee and against the Revenue.

No costs.

R.M. LODHA, J.

N.A. BRITTO, J.

ssm.